

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN R. WALCOTT, <i>et al.</i>	:	x
Plaintiffs,	:	07 Civ. 7072 (AKH)
v.	:	
WTC CAPTIVE INSURANCE	:	NOTICE OF MOTION
COMPANY, INC., <i>et al.</i>	:	
Defendants.	:	

Please take notice that, upon the annexed Declaration of David Biester and the exhibit thereto; upon the Memorandum of Law served herewith; and upon all other papers and proceedings heretofore had herein, the WTC Captive Insurance Company, Inc. (“WTC Captive”) will move this Court, before the Honorable Alvin K. Hellerstein, U.S.D.J., at Room 140 of the U.S. Courthouse, 500 Pearl Street, New York, New York 10007, at a date and time to be set by the Court, for an Order striking from the record privileged documents disclosed without the WTC Captive’s authorization and subsequently filed with this Court by a letter from Paul Napoli dated November 8, 2007, and for an Order directing the clerk to return the stricken documents to the WTC Captive.

Dated: November 14, 2007

MCDERMOTT WILL & EMERY LLP

By: Robert A. Weiner

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Insurance Company, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN R. WALCOTT, <i>et al.</i>	:	X
Plaintiffs,	:	
v.	:	
WTC CAPTIVE INSURANCE	:	
COMPANY, INC., <i>et al.</i>	:	
Defendants.	:	

**DECLARATION OF
DAVID R. BIESTER**

DAVID R. BIESTER, declares as follows pursuant to 28 U.S.C. § 1746:

1. I am General Counsel of the WTC Captive Insurance Company, Inc. ("WTC Captive").
2. GAB Robins North America, Inc. ("GAB Robins") is the third-party administrator for the WTC Captive.
3. In its position as third-party administrator, GAB Robins comes into possession of privileged WTC Captive documents that include invoices from the WTC Captive's attorneys.
4. The WTC Captive recently learned, based upon information received from Paul Napoli, that an employee of GAB Robins purportedly disclosed privileged legal invoices to a reporter. See Letter from Paul Napoli to Hon. Alvin K. Hellerstein (Nov. 8, 2007) (attached as Exhibit A hereto).
5. The WTC Captive is also aware that a newspaper article by Susan Edelman, which references invoices submitted to the WTC Captive by its attorneys, was published in the New York Post on November 11, 2007.

6. The WTC Captive believes that invoices referenced in the November 11, 2007 newspaper article are included in the materials mentioned in the November 8, 2007 letter from Paul Napoli to Judge Hellerstein.

7. GAB Robins employees were not authorized to disclose the invoices to anyone outside of GAB Robins, including but not limited to Ms. Edelman and Mr. Napoli.

8. Because the disclosure of the privileged material was unauthorized, the WTC Captive has not waived the privilege. *See Letter from David R. Biester to Paul Napoli (Nov. 13, 2007) (attached as Exhibit B hereto).*

9. I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 14, 2007
New York, New York



David R. Biester

EXHIBIT A

Worby Groner & Napoli Bern LLP

A Partnership of Limited Liability Partnerships

115 Broadway

New York, New York 10006

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PAUL J. NAPOLI

SENIOR PARTNER

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November 8, 2007

Via HAND DELIVERY

The Honorable Alvin K. Hellerstein
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1050
New York, New York 10007-1312

Re: *In re: World Trade Center Disaster Site Litigation*
21 MC 100 (AKH)

Dear Judge Hellerstein:

Enclosed, in a re-sealed UPS envelope, are papers received by my office from a reporter, who reportedly received them, in turn, from a whistle-blower employee of GAB Robins. GAB Robins is the third party claims administrator for the WTC Captive Insurance Fund, Inc.

We had been advised that a copy of the within papers was sent by that GAB employee directly to this office, to Senator Hillary Clinton, and to the reporter in question, who forwarded the enclosed to me. Notwithstanding that information, we have received only the within papers sent to us by the reporter; *we have not received* the package of papers supposedly sent directly to us by the GAB employee.

Although the envelope was opened upon its receipt from UPS by a mail room clerk; as soon as I realized what the envelope contained, having been forewarned by the reporter in question that the papers had been sent to my attention, I immediately returned the papers to the envelope without reading them. As well, no person in my office has reviewed the enclosed papers, *hence any privilege that may inure to the papers has been preserved*. We are forwarding the package to Your Honor for filing under seal.

If there is anything further Your Honor requires to accomplish such filing under seal, kindly advise us and we will comply.

Respectfully submitted,

WORBY GRONER & NAPOLI BERN, LLP
Plaintiffs' Co-Liaison Counsel

Paul J. Napoli

cc: Defendants' Liaison Counsel

EXHIBIT B



November 13, 2007

Paul Napoli, Esq.
 Worby Groner Edelman Napoli & Bern, LLP
 115 Broadway, 12th Floor
 New York, New York 10006

Dear Mr. Napoli:

The WTC Captive Insurance Company, Inc. ("WTC Captive") learned late last week that you have received and may receive in the future one or more packages of materials ("Materials") originating purportedly from an unknown source at GAB Robins North America, Inc., the third-party claims administrator of the WTC Captive. The WTC Captive did not authorize the disclosure of the Materials to you or any other party, and it appears that the Materials were stolen. We have reason to believe that the Materials are protected by the WTC Captive's attorney-client privilege and the attorney work product doctrine. The WTC Captive does not waive the protections of the attorney-client privilege and work product doctrine applicable to the Materials. Recognizing that you have represented to Judge Hellerstein that the Materials were submitted to him without review at your firm except to determine that they contain potentially privileged information, the WTC Captive is nonetheless compelled to write to ensure protection of its information.¹ Accordingly, the WTC Captive demands that you, your firm, and its agents:

- continue to refrain from reviewing the Materials that you have received;
- not disclose the Materials;
- immediately advise the WTC Captive if you have disseminated the Materials to any person (other than to Judge Hellerstein via your letter of November 8th), and if so, provide the name and affiliation of each such person;
- immediately return the original Materials and any physical copies that you may have made to the WTC Captive;

¹ The WTC Captive obtained copies of your letters to the court dated November 8, November 9, and November 12, wherein you represent that you sent the original set of Materials to the court. The WTC Captive's demands stated herein pertain to any additional Materials received by you, or any copies.

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Paul Napoli, Esq.
November 13, 2007
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- immediately destroy any electronic copies of the Materials that you may have, regardless of the form or type of electronic storage; and
- immediately advise the WTC Captive of any additional information you have concerning the circumstances under which the Materials were obtained by a third party and disclosed to you.

Finally, you improperly failed to copy the WTC Captive's counsel in the *Walcott* suit on your recent communications to the court. Please rectify this error going forward.

Sincerely yours,



David R. Biester
General Counsel

cc: Michael O. Adelman, Drinker Biddle
Margaret H. Warner, McDermott Will & Emery